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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. AL HENRY ALLEN et al., Defendants and Appellants.	C074260 (Super. Ct. No. 11F01080)

The criminal law has special rules for teenagers who are gang members and even for their friends who hang with them. Sadly, gang culture and guns is a deadly combination often claiming young lives and, as here, the lives of those who are not gang members. There is no evidence that defendants Al Henry Allen, Brandon Marcel Washington, or Jahmal Vance Dawson went to a high school graduation party held in a hotel across from a police station in an area of Elk Grove that was not claimed by any gang intending to encounter, let alone shoot and kill, D'Andre Blackwell, who was not a gang member but had the misfortune of being with two of his friends who were. Having been instructed on the sociology and psychology of gang members during a particularly

violent period of time in south Sacramento by a gang expert and on the law of aiding and abetting and the natural and probable consequences doctrine by the trial court following a joint trial, a jury convicted Allen, the shooter, of second degree murder and attempted murder with various enhancements and Washington and Dawson of assault with a deadly weapon and a gang enhancement.

This case raises many of the troubling issues that arise in gang cases, which routinely rely so heavily on gang expert testimony. Some of the defendants' meritorious arguments require reversal of various counts and others are harmless under the appropriate standards of review. Others are without merit. In brief, we conclude:

1. Allen's conviction for attempted murder must be reversed because the second victim was not in the direct line of fire as the victim who was killed with a single shot.
2. Washington's conviction for assault with a firearm, and the accompanying gang enhancement, must be reversed for insufficiency of the evidence.
3. Dawson's case must be transferred to the juvenile court for a fitness hearing because he was 17 years old at the time of the shooting.
4. Minor corrections must be made to the abstract of judgment regarding Allen's sentence.
5. In all other respects, the judgment is affirmed.[1]

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[1] We need not address Washington and Dawson's contention that the cumulative effect of the alleged errors warrants reversal of their judgments. Washington's judgment is reversed for insufficiency of the evidence and Dawson's case is transferred to the juvenile court. They have achieved their objectives. We agree, however, with Dawson that his probation report should be corrected as ordered by the trial court by striking lines 12 through 15 on page No. 5.

FACTS

The Prosecution's Case

The Gang Scene in June of 2010: The prosecutor called a gang expert to tutor the jury on all things gang related. Included in the tutorial was an explanation of the explosion of violence between rival gangs from late 2007 until the time of the shooting in June 2010. During that time period there had been 26 shootings, including five homicides. The shootings were almost all committed in groups. The allegiances pitted G-MOBB, Guttah Boys, and Starz against their enemies Gunz Up, Oak Park Underworld Zilla, Oak Park Bloods, Fourth Avenue Bloods, FAB Zilla, and Ridezilla. The expert opined that, during this time, gang members understood the unspoken policy to shoot their enemies on sight.

The Scene of the Crime: On June 5, 2010, large numbers of teenagers had gathered at the Holiday Inn in Elk Grove for multiple, and ostensibly, wholesome purposes. A recent high school graduate was hosting a graduation party. Once posted on social media, the party attracted scores of teenagers the host did not know. High school cheerleaders, engaged in a cheerleading competition, were also staying at the hotel. As groups of young men entered the hotel to party, the cheerleaders opened their doors and lobbied their coach and chaperones to allow them to join in the fun.

The Victims: D'Andre Blackwell, the decedent, was not affiliated with any criminal street gang. Rakeem Collins, a member of Oak Park Underworld Zilla, spent several months at the Boys' Ranch with Allen, a validated member of Guttah Boys. There was no personal animosity between them. Leon Macafee was a member of Gunz Up. On the night Blackwell was shot, Macafee was wearing a sweater with the photograph of one of his friends, another Gunz Up gang member who was killed by G-MOBB and Starz gang members, and the insignia, "GIP" for gun in peace. All three victims were unarmed.

Blackwell, Collins, Macafee, and Omariyea Boughton rode together to the Holiday Inn party. Collins testified they went to the party merely to pick up an I.D. from a friend he could use to get into a club. As soon as they walked into the hotel, they were asked where they were from and, when Collins responded he was from Oak Park, someone said something like "You know it ain't good." They started down a hallway looking for an elevator to take to the party. Collins estimated that a group of 20 to 30 teenage boys blocked their way, whereas Macafee estimated there were between 10 to 15 rival gang members who approached them; both testified the group began to disrespect them by chanting "Gunz down," "Gas them niggas," and "Bust the niggas." An argument ensued. Collins responded, "You got me fucked up." At that point, he saw at least five guns come out. Macafee could see that two of the boys held guns tucked in their clothing, one of which was a revolver, and a third grabbed his waistband as if he had a fairly big gun like a .40 caliber.

At the end of the hallway, there were two doors; one an exit and the other a door to a staircase. Macafee believed it was too dangerous to exit the hotel because the gang bangers would feel free to shoot. While opening the staircase door, he shouted, "F you, niggas. Let's go." He ducked into the staircase, followed by Blackwell and then Collins. Just as Collins turned to close the door, he saw a silver revolver held by an African-American hand and then he heard a single gunshot. Collins and Macafee both testified they did not see who fired the shot. They ran up to the third floor, but then Blackwell, who was bleeding, collapsed and died. The bullet had struck him in the back. Neither Collins nor Macafee identified any of the defendants as present on the night of the shooting. Macafee, however, testified that Collins told him that Allen was the shooter.

The Accomplices: The prosecution's case rested primarily on the testimony of three accomplices—Raymond Shaw, Isaevion Anderson, and Kionte Lightner. All three initially had lied to the police. All three received favorable agreements with the prosecution in exchange for their truthful testimony. Shaw, however, breached his

agreement. He testified, and was subject to searing cross-examination, during the preliminary hearing. He later absconded and was unavailable to testify at the trial. We recite the facts related to the prosecution's efforts to obtain his presence in the body of the opinion addressing the defendants' collective challenge to the admissibility of his testimony. Without question, Shaw's testimony was the most damning, particularly for Allen.

Shaw and Allen were very close, having grown up with each other. Shaw, a Guttah Boys gang member, accompanied 10 friends to the Holiday Inn on June 5, 2010, and observed the argument between rival gang members. He recounted a basic chronology consistent with the victims' testimony. But, whereas they were unable or unwilling to implicate the defendants, Shaw was not. He identified Allen as the shooter. A couple of days after the shooting, he asked Allen why he had shot Blackwell. Allen laughed and explained that the boy had "disrespected" him. Shaw testified that Washington and Allen were in the front of the group, with Dawson close by. Dawson and Anderson taunted Macafee and his friends with slogans such as "Gunz down." The two groups were yelling back and forth and he heard Macafee saying, "Fuck Guttah." He did not see any weapons or flash any gang signs. According to Shaw, Allen was so high on cocaine, anything could have made him shoot. When the group reconvened at a gas station, Washington asked Shaw why Allen had fired a shot. Shaw said he did not know why.

Anderson also received a deal in exchange for his cooperation and testimony. Anderson, a member of the Guttah Boys gang, testified that most of the members of the group that gathered at his apartment complex before caravanning to the hotel party were affiliated with Guttah/Starz subsets. He admitted to concealing a gun in his waist because he did not want to be caught unarmed by any of his enemies in FAB and Gunz Up. He also testified he saw Allen carrying a revolver.

When Anderson and his friends entered the hotel, they encountered a group of three and he recognized Macafee, a member of Gunz Up, as one of the three. Macafee had his hand in his sweater acting like he had a gun. According to Anderson, Macafee said, "Fuck Guttah." He, and others, replied, "Gunz down."

Macafee's group walked away down the hallway. The Guttah Boys group pursued them. Anderson, Allen, and Dawson, Anderson testified, were at the front of the group. The two groups continued to argue, disrespecting each other. As Macafee disappeared into a staircase, followed by his two friends, Anderson saw Allen reach out his arm and fire once.

Kionte Lightner was the third accomplice to incriminate Allen and Washington. Washington took him to Anderson's apartment so he could retrieve his gun but he left it in the car before entering the hotel. He testified he saw a black handle sticking out of Allen's pocket before they left the apartment.

The Rap Video: Washington, Allen, and Dawson appeared in a rap video performed by Starz member Lavish D filmed earlier on the day of the shooting. In the video, the participants are seen disrespecting Gunz Up.

The Gang Expert: The expert provided the jury with the customary background on criminal street gangs in Sacramento, including the names of the gangs, the rivalries, the crucial importance of respect, the significance of hand signs and tattoos, the predicate offenses, the primary activities of the gangs involved, and how and why potential gang members put in work for their gang. In short, the expert tried, as gang experts always do, to give the jurors an insight into the mindset of gang members and an understanding of the psychology and sociology informing gang behavior. He opined that the shooting was committed for the benefit of and in association with the G-MOBB, Starz, and Guttah Boys gangs.

Where this particular expert veered off course, in defendants' view, is when he opined on a nonexistent "shoot on sight" policy and related case-specific hearsay to

support his opinion that each of the defendants was a gang member. We elaborate on this testimony in addressing defendants' objections to the expert's opinions.

Defenses: Dawson presented no witnesses in his defense. Washington presented evidence that he vacationed with members of Gunz Up after the shooting. Allen testified on his own behalf. He denied shooting Blackwell. He could not remember what anyone said and he denied that he or any of his friends had a gun. He did not see who shot Blackwell because he was looking at Washington who was talking on his cell phone.

DISCUSSION

I

Right to Confrontation

Fundamental to our constitutional notion of a fair trial is the right to confront and cross-examine witnesses against a criminal defendant. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; Pen. Code, § 686;[2] *People v. Louis* (1986) 42 Cal.3d 969, 982-983.) Defendants assert their most cherished right of confrontation was abridged when they did not have the opportunity to cross-examine Raymond Shaw, a material, and they argue, vital witness for the prosecution. Instead, when Shaw failed to appear for trial, the court allowed the prosecution to read a transcript of Shaw's testimony during the preliminary hearing. They insist that the egregious nature of the constitutional transgression requires nothing less than reversal of the judgments.

Even a right as sacred as the right to confront and cross-examine is not absolute. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038].) Testimonial statements may be admissible if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. (*Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354] (*Crawford*).) "Evidence Code section 1291 codifies this traditional

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[2] Undesignated statutory references are to the Penal Code.

exception. [Citation.] When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citation.]' " (*People v. Wilson* (2005) 36 Cal.4th 309, 340.)

"Evidence Code section 1291, subdivision(a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is 'unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' In turn, Evidence Code section 240, subdivision(a)(5), states a declarant is 'unavailable as a witness' if the declarant is '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (*People v. Wilson, supra*, 36 Cal.4th at p. 341.)

The courts have not divined a mechanical definition for reasonable or due diligence. It does connote " 'preserving application, untiring efforts in good earnest, efforts of a substantial character.' " (*People v. Cromer* (2001) 24 Cal.4th 889, 904.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' " (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) The prosecution bears the burden of proving due diligence in attempting to secure a witness's attendance at trial. (*People v. Roldan* (2012) 205 Cal.App.4th 969, 979.)

In some instances, the prosecution has the burden not only to find a material witness after he or she disappears, but to prevent the witness from fleeing. To trigger this additional burden to take adequate preventative measures to stop the witness from disappearing, the prosecutor must have knowledge of a substantial risk the witness will

flee and the witness's testimony is critical or vital to the prosecutor's case. (*People v. Friend* (2009) 47 Cal.4th 1, 68; *People v. Louis, supra*, 42 Cal.3d at pp. 989-991.)

Shaw reluctantly met with the prosecutor on May 10, 2013, in preparation for his testimony scheduled to begin on May 14. He repeatedly asked the prosecutor to play a videotape of the preliminary hearing rather than making him testify. Although afraid of retaliation, he agreed to testify on May 14. But on the morning set for his testimony, Shaw's mother informed the prosecutor that Shaw was en route to the hospital for anxiety and chest pains and he would not appear at the trial. The prosecutor asked the court to issue a no-bail bench warrant for Shaw and asked his investigator to find him. The prosecutor's investigator testified at length to the attempts he then took to find Shaw and make him available to testify.

On May 14, the investigator spoke to Shaw's mother and tried to locate him at the hospital. He was told he was not there. His mother assured the investigator she would try to find him.

The investigator explained that he began "a process of due diligence, including but not limited to delving into his background, his associates, known locations that he had frequented, people that he had contacted during various periods of confinement with law enforcement, and I began to prepare a Court-ordered request for cell phone information." He researched several public record databases, the Known Persons File in the CJIS system, and the Sacramento Police Department's Versadex system and then cross-checked the data from each system. He came up with a list of people with whom he believed Shaw associated. He solicited the help of the Sacramento County Sheriff's Department warrant and fugitive detail to establish surveillance on a known location, and learned that Shaw had been at that location as recently as that morning.

The investigator spoke to Shaw by telephone at 1:24 p.m. on May 14. He listened to Shaw's concerns about retaliation and explained the consequences if he failed to

appear. Shaw insisted that he needed a week to clear his head. After the investigator told him he could not have an additional week, he said "Come find me," and hung up.

The investigator obtained court ordered cell phone records. Through these records, he was able to locate Shaw's girlfriend's mother, who was very cooperative. By that time, Shaw's mother had become hostile, but her husband had not. The investigator also contacted an account holder of a cell phone Shaw had used to make and receive calls. The account holder was aware that Shaw was evading law enforcement but did not know how to contact him.

Surveillance at four different residences began on May 14: Shaw's girlfriend's house, his mother's house, the cell phone account holder's house, and Shaw's most recent residence. The sheriff's department provided the surveillance during the day and the investigator conducted surveillance of the residences in the evening.

On May 15, the investigator and his partner conducted three hours of surveillance on three residences. He spent additional time with Shaw's girlfriend's mother who told him that Shaw had been at her house on May 14 and a family member had driven Shaw and her daughter to a location near Shaw's mother's house. He also knocked on doors to determine if Shaw was present.

On May 16, the investigator conducted spot-check surveillance of multiple addresses. He drove by the girlfriend's mother's house looking for target vehicles. He checked in again with Shaw's stepfather who had done his best to persuade Shaw to come to court, but did not know where he was. He visited Shaw's mother at her workplace but she would not talk to him. Again he knocked on doors to determine if Shaw was present.

The investigator worked only on this case through Friday, May 17. Although there was no surveillance conducted over the weekend, he continued to monitor other leads, including pin registers. The surveillance was suspended because Shaw was

actively evading the investigator and he had stopped using all the telephone numbers he was associated with. His mother was no longer helpful.

At the conclusion of an Evidence Code section 402 hearing, the trial court advised the prosecutor to make further efforts to apprehend Shaw. Those too proved unproductive. The investigator's request for additional investigative support from the sheriff was rejected. None of his contacts had heard from or seen Shaw since May 14. His girlfriend had called her mother and brother on May 19 but refused to disclose her or Shaw's whereabouts. He warned a friend of Shaw's girlfriend not to harbor Shaw or his girlfriend and he had no reason to doubt the friend's cooperative family.

The investigator also requested a call detail search of Shaw's girlfriend's cell phone. He learned that she had called her brother from a phone associated with regions in the Los Angeles San Fernando Valley. He could not find a match with all the numbers associated with Shaw. Nor could he find the listings of the phone number in public record databases and reverse directories.

Despite the investigator's efforts, defense counsel insisted the prosecution had failed to exercise due diligence to obtain Shaw's presence and the failure to produce him violated their constitutional rights to confrontation. The trial court disagreed.

The trial court explained that the prosecutor was "not required to undertake a marathon, active, be-on-the-lookout, all-points bulletin, no-resources-to-be-spared effort to bring in the witness." The court acknowledged that more could always be done. But this was not a case of mere "box checking," a hollow gesture to demonstrate diligence. Rather, the investigator, on the prosecution's behalf, "made an energetic effort, virtually nonstop for about a week, obtaining court orders as necessary, working with other district attorney personnel and other law enforcement of the allied agency personnel" to find Shaw. Indeed, in the court's view, there was a "genuine, energetic, vigorous effort" to obtain Shaw's presence. When requesting the bench warrant on the day Shaw absconded, the prosecutor ensured that Shaw could not be released prior to appearing in

court if he was arrested. The court concluded the prosecution had "seriously exercised all reasonable and even some additional efforts" to find Shaw. Because the prosecution had exercised due diligence in securing Shaw's attendance, the witness was unavailable for purposes of the confrontation clause and the preliminary hearing testimony could be read to the jury.

Defendants point to a number of alleged flaws and omissions in the prosecution's efforts to find Shaw. Most serious was stopping the search for three days. But defendants also contend that Shaw's disappearance was predictable; he was a substantial flight risk. He had expressed repeated reluctance to testify and a genuine fear of retaliation. Anyone familiar with gang culture was aware that snitching was taboo and Shaw had testified against, not only a fellow gang member, but someone he had come to regard as family. Defendants insist Shaw's testimony was vital and his credibility was suspect. Therefore, they propose a number of precautions the prosecution should have taken including independently verifying his address when he met with the prosecutor on May 10, keeping him under surveillance until he testified, and/or detaining him under the "material witness" provision of section 1332. We turn to an exemplar of cases for guidance, mindful of our duty to independently review the trial court's ruling. (*People v. Cromer, supra*, 24 Cal.4th at p. 901.)

The California Supreme Court upheld a finding of due diligence in *People v. Wilson* (2005) 36 Cal.4th 309 (*Wilson*), on facts far less favorable to the prosecution. In *Wilson*, a criminal conviction was reversed while a material witness was in prison or had been recently released. (*Id*. at p. 341.) A few months before the retrial, a detective tried for two days to locate the witness including visiting his last known address, attempting to locate his known associates, and checking police, county, and state records with the 15 different names he had used. (*Id*. at pp. 341-342.) The detective could not find him. (*Ibid.*) Like defendants in the case before us, the defense outlined a list of prosecutorial should haves. The defense argued that once the judgment was reversed, the prosecution

should have contacted and monitored him, should have contacted his family, should have checked with the post office for his forwarding address, should have followed up with his visitors in prison, and should have determined whether he was a party in any civil actions. (*Ibid*.) Having failed to take any of these additional steps, the defense maintained that the prosecution failed to exercise due diligence.

The Supreme Court disagreed. "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case . . . .' [Citation.] Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing." (*Wilson, supra,* 36 Cal.4th at p. 342.) The court concluded, " 'That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness.' " (*Ibid.*)

The efforts made by the prosecution's investigator in this case were even more exhaustive than those exerted by the detective in *Wilson.* He worked exclusively on tracking down Shaw for five days. He solicited the help of the sheriff's department to conduct surveillance at several locations. He obtained a voluminous amount of cell phone records. He spoke to Shaw's friends and family repeatedly. The prosecution immediately obtained a bench warrant as soon as it was informed that Shaw would not be present on the first full day of trial. In addition, the investigator secured the help of other law enforcement agencies. The fact that he suspended the active surveillance for three days, while continuing to monitor the cell phones, does not transmute a diligent and persistent search into a lackluster and constitutionally insufficient one. Rather, we agree with the trial court that the investigator's efforts were robust, or in its words, "genuine, energetic, vigorous."

There is no need to dissect the facts of each of the cases cited by defendants illustrating prosecutorial lack of due diligence. Suffice it to say, the facts are easily

distinguished. For example, in *People v. Roldan* (2012) 205 Cal.App.4th 969, the prosecution knew, but did not disclose to the defense or take a single precautionary step, that a material witness would be deported at the conclusion of the preliminary hearing. The prosecution did not impress on the witness the importance of staying in touch with investigators; nor did it seek a section 1332 material witness hold. Needless to say, the prosecution was well aware the material witness would be unavailable for trial and yet it sat idle.

In *People v. Louis, supra*, 42 Cal.3d 969, there was no witness whose testimony was more critical to the prosecution's case and no witness whose credibility was more suspect. In fact, he provided the sole evidence identifying the defendant as the trigger man. (*Id*. at p. 989.) Defendants would have us cast Shaw in a similar vein. It is true that Shaw was an important witness for the prosecution and his identification was particularly damning. But he was not the only witness to identify Allen as the shooter or Dawson as an active participant. Anderson's testimony paralleled Shaw's in all important respects and Allen, according to Macafee, told Collins he had shot Blackwell. Nearly all of the percipient witnesses were gang members and most of them had accepted favorable dispositions from the prosecution in exchange for their testimony. Thus, Shaw's credibility was no more suspect than many of the other witnesses who testified at trial.

In short, we conclude the prosecution exercised reasonable diligence in attempting to locate Shaw and make him available to testify at the trial. The prosecution had met with him a mere four days before his scheduled testimony and impressed on him the importance of following through with the terms of his agreement. After all, he had been facing a life term before negotiating a favorable agreement and had been released on his own recognizance. The prosecutor reasonably believed that, since he had already testified at the preliminary hearing and would be exposed to the life term if he failed to appear at trial, there was little risk he would jeopardize his freedom and risk a life in

prison by absconding. Given the herculean efforts exerted by the investigator just as soon as the prosecution was alerted that Shaw was en route to the hospital instead of the courthouse, efforts that continued for five days, and the additional effort the investigator made at the court's request just before the trial commenced, we agree with the trial court that Shaw was unavailable for trial because the prosecution had exercised due diligence and, therefore, allowing his testimony provided at the preliminary hearing to be read did not violate defendants' constitutional right to confrontation.

II

Admissibility of Gang Expert Testimony

"On Sight" Testimony

During motions in limine, defendants appealed to the trial court, as gatekeeper, to restrict the scope of the gang expert's testimony. Specifically, they feared the expert would testify that members of the rival gangs involved in this case would shoot "on sight." And indeed, during cross-examination, the expert was asked, "And I believe you said something about *on sight*, which to you meant that if any gang member of either opposing gang saw another gang member, that there was a probability of a shooting?" The expert's response was precisely what the defense had feared. He testified, "More than a probability of a shooting. *On sight* means there's going to be a shooting. If they have a means to commit that there's going to be a shooting and by means, I mean they're armed, they have a gun or means to get a gun."

Defendants argue on appeal, as they vigorously argued to the trial court below, that any testimony the gangs had an on sight policy, that they would shoot on sight, or any variation on the on sight theme was unreliable, beyond the expert's expertise, and was tantamount to the practice of testifying to individual gang member's specific intent under the guise of a hypothetical question as condemned in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). The trial court allowed a long, robust, and wide-

ranging debate on the admissibility of the gang's expert's testimony regarding on sight shootings. A close reading of the record, we believe, discloses a careful and nuanced exercise of discretion by the trial court and the good faith of the prosecutor. The prosecutor was well aware of the limitations imposed by *Killebrew* and he repeatedly assured the court that he would not ask the gang expert questions to elicit his opinion as to whether individual gang members entertained the specific intent to shoot, aid and abet a shooting, or commit any crime for the benefit of their gang. He also provided a helpful etiology on the use of on sight and distinguished the term from the manner in which defense counsel portrayed it. The trial court was equally forceful in prohibiting the solicitation of expert opinion on the ultimate factual issues in the case.

The problem, as the defense pointed out several times during the hearing on its motion in limine, was not the prosecutor or the scope of his hypothetical questions. The problem, as defendants perceived it, was the likelihood, almost the certainty based on the gang expert's testimony at the preliminary hearing, that the expert would testify that the rivalry between the gangs had escalated to on sight, meaning that when they see each other they shoot each other instantly on sight. No matter how well-intentioned the prosecutor was, or how thorough the trial court was in performing its gatekeeping function, defendants insist the testimony the expert ultimately provided was improperly allowed. While it may be tempting to report the nuances appreciated by all the advocates during the pretrial hearing on the admissibility of on sight testimony, it is the testimony the jury actually heard, and not the lawyers' speculation as to what it was going to be, that determines whether the trial court abused its discretion by allowing the gang expert's testimony. We examine the relevant testimony.

During direct examination of the gang expert, the prosecutor explored the group mentality or group dynamics specifically related to G-MOBB. He asked the expert whether, in reviewing all of the police reports involving G-MOBB, Gunz, and Guttah Boys and in all of his personal contacts with gang members, he had obtained a general

sense of their group mentality. The expert recounted that there had been a serious uptick in violence and "group dynamics involving shootings, primarily shootings in the south Sacramento, Oak Park area." By "group dynamics," the expert meant "two or more individuals contacting other individuals within that area and shooting them on sight."

The prosecutor posited a hypothetical based on the facts of this case. He queried: "If G-MOBB/Guttah/Starz gang members were in a group of 9 to 11 in Elk Grove at a hotel for a party, would you expect one or more of those people to be armed?" The expert opined: "At the time of the shooting with the amount of shootings that we were investigating and the homicides, we had five homicides in a two- to three-year span, multiple shootings between the groups, and the fact that over and over again it was told to investigators and myself that it was *on sight* with these individuals, these gang members know that. [¶] Any anytime that we've seen this group dynamic, there was always a gun involved, there was always someone who had a gun because they needed to be able to, one, retaliate if they were shot at, or, two, take an offensive and shoot at somebody if they were disrespected. And if they weren't disrespected, there were shooting[s] where no words were exchanged and they would just start shooting because it was *on sight* and they were a rival gang member."

At trial defense counsel aptly conceded the gang expert could testify to the intense rivalry between the two factions in south Sacramento. And there is no question he could testify to the sociology of gang culture and the psychology of gang members. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) But the question is whether he exceeded the scope of his expertise, presented unreliable evidence, or essentially attributed knowledge and intent to individual gang members by testifying to a so-called on sight policy. This question, in the context of the facts before us, is a difficult and close one. While we answer it with some trepidation, we do so succinctly because the error in admitting the testimony, if any, was harmless. In other words, while we are sympathetic to the defense argument that the characterization

of the shooting on sight policy of the gangs might have misled a hypothetical jury in a different trial, we are convinced that defendants overstate the risk the testimony posed to this fair trial on the record before us.

Defendants point to a number of flaws in the expert's on sight theory. As even the expert admitted, there were innumerable times when the rival gangs encountered each other and did not shoot. How many times was impossible to quantify as those encounters were never reported. The expert could only speculate as to the reasons they did not shoot on those occasions, including why no one shot during the first verbal confrontation at the hotel. Many of the gang members' testimony was at odds with such so-called on sight policy known, and presumably, accepted by everyone. One gang member testified he never expected any violence, let alone a shooting, in a hotel with cameras rolling at all times.

Moreover, the premise for the expert's testimony, the fact that 26 shootings had been committed within a two- to three-year time frame between the rival gangs resulting in five homicides, was undermined by the fact that only nine had been solved, and all involved an issue of being on the wrong turf at the wrong time. Here no gang claimed the area where the shooting occurred.

In addition to questions of reliability and whether the characterization of a gang policy exceeded the scope of the expert's expertise, is the important issue whether the expert's testimony violated the *Killebrew* proscription against an expert opining on a gang member's intent based on what the expert believed was common knowledge within a gang. On this close question, we must agree with the defense. We acknowledge that the prosecutor, keenly aware of the *Killebrew* limitation, did not solicit an opinion in explicit violation of that holding. But the prosecutor had been forewarned and the expert's response, whether solicited or not, we believe falls within the logic of *Killebrew*.

In *Killebrew*, the gang expert, through his answers to a series of hypothetical questions, testified that when a group of gang members are in a car and there is a gun

present, all of the car's occupants would know of the gun and constructively possess it. (*Killebrew, supra*, 103 Cal.App.4th at p. 652 & fn. 7.) The court found the testimony was not meant to educate jurors about an area in which they would have little understanding, but to establish "the subjective *knowledge and intent* of each occupant in each vehicle." (*Id*. at p. 658.)

Similarly, the gang expert here testified that whenever a G-MOBB/Starz/Guttah Boys gang encountered Gunz Up or an affiliate gang, gang members knew to shoot on sight, meaning the encounter was going to end in a shooting. The testimony was too dangerously akin to the *Killebrew* testimony ascribing knowledge and intent to individual gang members. For, in fact, the gang expert disabused defense counsel of the notion that there was a probability there might be a shooting with his authoritative prediction that there would be a shooting because on sight means exactly that—there would be a shooting. Whether characterized as unreliable because of the number of unknown instances when rival gangs met and there was no shooting, as beyond the expert's expertise because he had an insufficient basis for making such a false claim, or as improper opinion because it ascribed knowledge and intent to every single gang member in south Sacramento for a two- or three-year time period, the gang expert should not have been allowed to render his opinion that every time the rival gangs encountered each other in groups they knew there would be an on sight shooting.

Nevertheless, we find the loose language harmless. Defendants vastly overstate the significance of the on sight remarks in the context of the entirety of the gang expert's testimony. The expert properly testified to the intensity of the rivalry between south Sacramento's gangs, an intensity in which deadly violence had spiked and shootings had become routine. He provided the jury with sobering statistics to illustrate the escalation in violence and he demonstrated how the gang members' behavior on the night of Blackwell's shooting was consistent with the pattern of violence he had observed during this heightened time period. Thus, we agree with the Attorney General that his shorthand

reference to shooting on sight was merely cumulative to the longer explanation he had given the jury and was another way of signaling the importance of the group dynamic he was attempting to explain. We conclude the on sight testimony was harmless under any standard and had little, if any, practical impact on the jurors in this case.

Expert's Use of Hearsay

In a breathtaking rebuke to the freewheeling testimony routinely offered by gang experts, in 2016 the California Supreme Court recognized for the first time that the confrontation clause of the United States Constitution imposes limits on the admissibility of gang expert testimony. (*People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).) *Sanchez*, however, is much broader than the Sixth Amendment's confrontation clause or gang expert testimony. The Supreme Court also clarified the proper application of Evidence Code sections 801 and 802 relating to the scope of expert testimony. Defendants Dawson and Washington urge us to strike their gang enhancements and reverse their convictions because the trial court admitted precisely the type of testimonial case-specific hearsay testimony by the gang expert proscribed in *Sanchez.*

Our consideration of defendants' argument begins, as the Supreme Court advises, with a two-step analysis. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, as a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680.) The first step in the analysis, however, is more complicated than it appears at first blush. We turn to the Supreme Court's prologue in *Sanchez.*

Beginning with an examination of the state evidentiary rules for expert testimony, the court reminds us that the hearsay rule traditionally has not barred an expert's testimony regarding his or her general knowledge in his or her field of expertise. (*Sanchez, supra,* 63 Cal.4th at p. 676.) Importantly, that knowledge often comes from inadmissible hearsay evidence. (*Ibid*.) The latitude accorded experts to testify to the otherwise inadmissible hearsay informing their knowledge, the court stated, "is a matter of practicality" to provide "specialized context the jury will need to resolve an issue." (*Id*. at p. 675.) Until *Sanchez*, that latitude saw few limits.

But in *Sanchez*, the court distinguished the admissibility of an expert's general background knowledge based on hearsay from "case-specific facts," which traditionally experts were precluded from including as a basis for their opinion. According to the court, "[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) "The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Ibid*.) Thus, the dispositive threshold task is deciphering whether the challenged testimony constitutes general background information or case-specific facts.

The prosecution elicited substantial nonhearsay evidence about gang culture, gang membership, the spike in gang violence, gang expectations, and gang behavior not only from the gang expert, but also from many of the witnesses at trial. And not all of the gang expert's testimony is hearsay. Thus, it is important to identify the voluminous evidence that is not hearsay at all.

As to Dawson, that evidence includes his appearance in a gang rap video featuring many of the defendants who were charged in this case throwing gang signs and disrespecting rival gangs; his gang moniker; several photographs on his cell phone showing him associating with gang members and throwing gang signs; testimony that he shouted "Gunz down" during the confrontation with Gunz Up gang members; testimony

that he was at the front of the group of G-MOBB/Starz/Guttah Boys gang members as they taunted the three victims; and testimony by other gang members that he too was a member of Guttah Boys.

As to Washington, the evidence includes his appearance in the same gang rap video; his own gang moniker, "Big Beelan"; the expert's personal observation that a gang member flashed him a gang sign at the jail; gang images on his cell phone, including an advertisement for a Gunz down shirt and a text message reading "Gunz down"; a gang-related email address; and evidence that he, like Dawson, stood in the front of the group of G-MOBB/Starz/Guttah Boys gang members when the shooting occurred. Neither Dawson nor Washington appear to challenge the admissibility of this nonhearsay evidence.

They object vigorously, however, to several other categories of evidence they characterize as "case-specific," and therefore, inadmissible under *Sanchez.* As to this evidence, therefore, we are faced with the general background versus case-specific fact dichotomy. No one disputes the evidence is hearsay; the question is whether the evidence should have been admitted as the type of general background information sanctioned in *Sanchez* or prohibited as case-specific hearsay.

Dawson and Washington both challenge the admissibility of the gang expert's testimony about two predicate offenses, 26 prior shootings, and the prevalence of a group dynamic culminating in a shoot on sight mentality. The admissibility of the expert's testimony regarding the predicate offenses is the most problematic. He testified to the details surrounding two crimes committed by other gang members from police reports; he had no personal knowledge about either offense. None of the defendants or witnesses in this case were involved in the predicate offenses described by the gang expert. *Sanchez* does not address the admissibility of testimony regarding predicate offenses and it is unclear whether testimony about a pattern of gang activity or, in this case the predicate offenses to establish the requisite pattern, constitutes permissible hearsay as a basis for

the expert's background knowledge or case-specific hearsay the court will no longer tolerate.

In *People v. Meraz* (2018) 30 Cal.App.5th 768 (*Meraz*) the Second District found that because under *Sanchez* facts are only case specific when they relate " '*to the particular events and participants* alleged to have been involved in the case being tried' " (*Id.* at p. 781), testimony that the gang had engaged in a pattern of offenses constituted general background testimony "which was unrelated to defendants or the current shooting and mirrored the background testimony the expert gave in *Sanchez.*" (*Ibid.*)

Here, the source of the testimony is hearsay. The expert relied on police reports for all the information he reported about the predicate offenses. And the hearsay was clearly offered to prove an element of the enhancement. Yet we must agree with *Meraz* that neither the source nor the use of the hearsay is determinative. Although the Supreme Court dealt a deathblow to the old paradigm allowing experts to testify to the truth of the facts they reported as long as the court engaged the jury in the fiction they were only to consider the hearsay in assessing the credibility of the expert's opinion, the court retained a pragmatic latitude for an expert to explain general background facts even when he or she relied on what would otherwise be inadmissible hearsay. Without that latitude, there would be very little an expert could add to the jury's understanding of the evidence. Thus, the key to understanding *Sanchez* is to understand what constitutes a case-specific fact and the court generously provided a very concrete definition the court in *Meraz* utilized. Since facts are only case specific when they relate to the particular event and participants involved in the case being tried, we too conclude that predicate offenses constitute background information rather than the case-specific facts targeted by *Sanchez.*

It is important to point out that the two predicate offenses utilized by the gang expert did not involve any of the defendants or any of the other participants in this case. He did not use the charged offense as one of the two necessary predicate offenses. To the contrary, the first predicate offense involved Jamel Stevens, a Starz gang member, who

was convicted of a 2007 murder with a gang enhancement and the second involved Antoine Torrance, another Starz gang member, who was convicted of a 2008 attempted murder with a gang enhancement. The predicate offenses, therefore, were distant in time, removed geographically, and did not involve any of the gang members involved in the instant case. They provided part of the generalized profile of the type of gang activity occurring in the years preceding the Blackwell shooting but they did not constitute case-specific facts as defined by our high court in *Sanchez.*

Dawson and Washington also object to the gang expert's testimony about the 26 shootings, including five homicides, in the two to three years preceding the shooting in this case as well as his theory that all the gang members assembled in a group during this time period would know to shoot on sight if they encountered a group of rival gang members. Again they characterize this testimony as relating case-specific facts. And as to three of the 26 shootings we agree because the expert testified that Dawson was present at three of the shootings. His testimony as to those three shootings, therefore, related to a participant in the case being tried, was case specific, and, pursuant to *Sanchez*, inadmissible hearsay. The error in admitting the hearsay is harmless, however, given that the testimony as to the 23 other shootings was admissible.

The expert's description of the raging hostility between the rival gangs, however, is precisely the type of background information a jury needs to understand the distinct cultural expectations imposed by gangs on their members and the climate of violence that permeated gang life between 2007 and 2010. The spike in fatal shootings and gang member's reports of what will occur "on sight" provided the background knowledge the expert used to opine that the crimes committed on the night of June 5, 2010, were committed for the benefit of a criminal street gang. Jurors unfamiliar with the sad, but potent and perverse, incentive to shoot in a public hotel with cameras rolling are reliant on the expertise of a gang expert to explain, what appears to the lay juror, unexplainable. As long as the expert's explanation does not include case-specific facts relating to the

participants involved in the case being tried on the assumption those facts are true but enlightens the jury on the overall climate of life in gang neighborhoods as evidenced by the number of increased shootings, the testimony is properly admitted as the general background information *Sanchez* tolerates.

Dawson and Washington separately challenge the gang expert's testimony that they were members of the Guttah Boys gang. The expert reported several contacts Dawson had with other law enforcement officers and he forthrightly explained that he was not personally present during any of these contacts, nor did he personally investigate Dawson's involvement on any of those occasions. This testimony represents the very type of case-specific facts *Sanchez* forbids. Under a traditional state evidentiary analysis, the first step in the two-step evaluation encouraged in *Sanchez*, the hearsay evidence was admitted improperly. As a consequence, we must determine whether Dawson was deprived of his constitutional right to confrontation, a determination dependent on the threshold question whether the hearsay was testimonial. Courts have been grappling with the precise meaning of testimonial hearsay since *Crawford*, *supra*, 541 U.S. 36, was decided. Our Supreme Court distinguished testimonial from nontestimonial statements this way: "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra*, 63 Cal.4th at p. 689.)

"The Sixth Amendment provides that an accused has the right to be confronted with the witnesses against him. (U.S. Const., 6th Amend.; *Sanchez, supra*, 63 Cal.4th at p. 679.) In the seminal case of *Crawford*[, *supra*,] 541 U.S. 36, the high court overruled its prior precedent and held that the Sixth Amendment generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior

opportunity for cross-examination. [Citations.]" (*People v. Iraheta* (2017) 14 Cal.App.5th 1228,1243.)

In this case, as in other post-*Sanchez* cases, the record remains undeveloped. (See, e.g., *People v. Ochoa* (2017) 7 Cal.App.5th 575, 584.) The gang expert testified to four of the contacts Dawson had with law enforcement based on information he gleaned from police reports. If those police reports were created during the investigation of a completed crime, the hearsay would be characterized as testimonial. (*Sanchez, supra*, 63 Cal.4th at p. 694.) The circumstances surrounding those four contacts, however, is unclear. Perhaps they were made informally. In the wake of *Sanchez*, appellate courts have deemed admissions made during informal interactions between gang members and law enforcement to be *nontestimonial* hearsay. (*People v. Ochoa, supra*, at p. 585.) Insofar as the record fails to establish whether any particular statement was testimonial, Dawson has failed to sustain his burden to affirmatively demonstrate error on the record before us. (*People v. Battle* (2011) 198 Cal.App.4th 50, 62.)

The Attorney General concedes, however, the remaining contacts the expert described constitute inadmissible testimonial hearsay because they appear to be based on police reports created during the course of investigations following completed crimes. Confronted with a violation of defendant's constitutional right to confrontation, we must determine whether the admission of the inadmissible testimonial hearsay was harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at pp. 698-699.) We find the admission of the gang expert's testimony about contacts Dawson had with law enforcement was harmless even under the more rigorous standard of prejudice compelled when a criminal defendant's constitutional rights have been infringed.

Here the evidence Dawson had various contacts with law enforcement was merely cumulative to the more direct and personal evidence demonstrating he was an active gang member at the time of the shooting. The evidence of membership is compelling. He was known by his gang moniker, JD, he appeared in the rap video alongside other gang

members wherein he was seen flashing a gang sign, and he had photographs of himself, in the company of gang members also flashing gang signs, on his cellular telephone. Other gang members testified Dawson belonged to a gang. His conduct during the shooting, according to the percipient witnesses who testified, was consistent with gang behavior. He stood at the front of the group and joined the chorus chanting, "Gunz down." The additional evidence that he had a number of contacts with law enforcement added little to what the jury already knew from admissible evidence. We therefore conclude the admission of the expert's testimonial hearsay was harmless beyond a reasonable doubt.

There was far less evidence that Washington was an active gang member. Indeed, Collins and Macafee both testified they did not believe Washington was in a gang. The difference, however, is there was no testimonial hearsay used to persuade the jury Washington was a gang member, as there was about Dawson. Washington, like Dawson, argues the expert's testimony about the 26 shootings, the predicate offenses, and the group dynamic leading to a shoot on sight theory constituted inadmissible hearsay. That argument, as discussed above, lacks merit.

As with Dawson, most of the evidence of his gang membership did not consist of hearsay statements. The gang expert testified Washington appeared in the same "Project Nigga" video as Dawson and he had his own moniker, "Big Beelan." He, like Dawson, was in a position to have front row viewing of the shooting. On his phone, the expert explained, was a "Gunz down" advertisement and he also signed his text messages with "Gunz down." His email address, STACKZOME1100, was gang-related. The expert personally observed a validated gang member flash Washington a gang sign in the jail.

Washington objects most vociferously to the expert's testimony about an intercepted "kite" another gang member purportedly sent to Washington but he never received. A kite, according to the gang expert, is a letter from one gang member to

another in jail.[3] Because the correspondence was sent by a gang member to another alleged gang member, it did not constitute testimonial hearsay. It was not an official document prepared to be used as testimony at trial.

To the extent the contents of the kite contained inadmissible hearsay under state evidentiary rules, a different standard of prejudice applies. It is not reasonably probable the jury would have found the gang enhancement not true if the gang expert's testimony about the kite had been excluded. Defense counsel argued to the jury there was no evidence Washington received the kite and it was imminently unfair to ascribe gang membership to an inmate just because another inmate addressed a letter to him. It was the jury's prerogative, not ours, to weigh all the evidence of Washington's gang membership. For our purposes here, it is enough to say the introduction of any inadmissible hearsay in the contents of the kite was harmless because it paled in significance to the more compelling nonhearsay evidence presented at trial.

III

Sufficiency of the Evidence

Allen: Attempted Murder

The one shot Allen fired into the stairwell was used to convict him of both murder and attempted murder. On appeal, he argues there is insufficient evidence he specifically intended to kill Macafee who was in the stairwell at the same time as the decedent, but escaped injury. It is important to point out at the outset that the jury was not instructed, and the prosecutor did not argue, the so-called kill zone theory whereby the jury could

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[3] The gang expert attempted to summarize the kite and describe how it affected his opinion. He explained: "Just the first sentence alone says, *What's gas with it?* And that was significant to me because part of the Guttah Boy -- often in gangs you will have just little subsets, four or five guys, they've started referring themselves as the gas team, which is the team that would basically go out and shoot people. So when he says, *What's gas with it, big bra,* to me right there that would be an indication that Mr. Washington was affiliated with Junius Winters who validated G-MOBB."

infer that Allen entertained a concurrent intent to kill everyone within the zone of fatal danger created by his conduct. (*People v. Bland* (2002) 28 Cal.4th 313.) We are, therefore, confronted with the straightforward question whether there is substantial evidence to support the jury's finding that Allen had the specific intent to kill *both* Blackwell *and* MacAfee.

The limited scope of appellate review is well known. We must indulge every inference in favor of the prosecution. We scour the entire record for substantial evidence, that is evidence that is reasonable, credible, and of solid value. As long as there is substantial evidence to support a jury's finding of guilt beyond a reasonable doubt, we must affirm the judgment. (*People v. Leon* (2010) 181 Cal.App.4th 452, 463 (*Leon*).)

The requisite mental state for attempted murder differs from the mental state for murder. " 'Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]' [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) To uphold Allen's conviction for attempted murder, it is not enough to show he intended merely to kill someone inside the stairwell. (*Leon, supra*, 181 Cal.App.4th at p. 464.) "It must be shown that he intended to kill each of the . . . victims." (*Ibid*.)

Intuitively it seems like an exceedingly difficult, if not impossible, burden to show that a defendant intends to kill two people with one shot. Yet the Attorney General refers us to three such cases. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683 (*Chinchilla*); *Smith, supra*, 37 Cal.4th 733; *Leon, supra*, 181 Cal.App.4th 452.) In each of these cases, the attempted murder conviction was upheld because the victim of the attempted murder was in the direct line of fire as the victim of the murder. The lesson to be gleaned from these cases, as the concurring justices warned in *People v. Perez* (2010) 50 Cal.4th 222 (*Perez*), is that "prosecutors in future attempted murder cases can be expected to argue

that multiple victims were positioned so that a single gunshot could have hit them all, even though evidence may be entirely lacking that the defendant's gunshot was objectively likely, or subjectively expected, to hit more than one person. . . . The number of convictions arising from a single shooting will thus come to depend not on whether the defendant was proven to have intended to shoot and kill more than one person and to have committed an act that would ordinarily have had that result if not for bad aim or other failure, as previously required, but on the victims' precise positions at the time of the shooting." (*Id.* at p. 236.)

And that is precisely what the Attorney General argues here. He analogizes Blackwell and Macafee's positions to the victims' positions in *Chinchilla*, *Smith*, and *Leon*. In *Chinchilla*, the defendant fired at one police officer who was crouched in front of another police officer. (*Chinchilla*, *supra*, 52 Cal.App.4th at p. 764.) In *Smith*, the defendant fired in the direction of a baby secured in his car seat directly behind his mother, the driver. (*Smith*, *supra*, 37 Cal.4th at p. 737.) In *Leon*, the defendant also fired at a passenger sitting directly behind the driver. (*Leon*, *supra*, 181 Cal.App.4th at pp. 457-458.) In each case, the court emphasized that the victim of the attempted murder was in the direct line of fire as the victim of the murder. The Attorney General contends that Macafee was similarly in the line of fire when the bullet struck Blackwell.

Allen urges us to apply the rationale of *Perez*, *supra*, 50 Cal.4th 222, wherein the court found insufficient evidence to support seven counts of attempted murder where no particular individual had been targeted and only one shot was fired at seven peace officers and a civilian. (*Id.* at p. 224.) The court concluded the evidence was sufficient to sustain only a single count of premeditated attempted murder of a peace officer. " 'The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being.' [Citation.] Here, defendant fired the single shot at the group intending to kill *someone*, but without targeting any particular individual, and without using a means of force calculated to kill everyone in the group. . . . On facts such as

these, where the shooter indiscriminately fires a single shot at a group of persons with specific intent to kill *someone*, but without targeting any particular individual or individuals, he is guilty of a single count of attempted murder." (*Id*. at p. 225.)

The Attorney General attempts to massage the facts to fit the *Chinchilla*, *Smith*, and *Leon* "direct line of fire" template and disregards the rationale of *Perez.* Although the Attorney General concedes that Macafee was not in the direct line of fire, he emphasizes that Macafee was not completely to Blackwell's side. The machinations continue. The Attorney General argues, "Blackwell was shot in the left side of his upper body, which would have been the portion of Blackwell's body nearest to Macafee from Allen's perspective." "Although Blackwell was positioned somewhat to the right of Macafee, Blackwell was so close to Macafee that Macafee would have hit him if he had simply reached back with his elbow." He concludes, "A rational jury could have determined, under *Smith* and *Chinchilla*, that even if Blackwell was positioned somewhat to Macafee's right at the time of the shot, they were both in a direct line of fire and that Allen intended to kill them both." We disagree.

Without debating the merits of the *Smith* rationale, the fact remains that using a single shot to justify multiple counts of attempted murder remains the aberration justified only, according to the majority of the Supreme Court, when one victim remains in the direct line of fire of the victim who is murdered. Here Macafee was not in the direct line of fire. It is impossible to imagine how Allen could have intended to kill Blackwell and Macafee with a single shot no matter how narrow the stairwell might have been when Blackwell was not directly in front of Macafee. The fact that the shooting might have endangered Macafee is no substitute for the requisite finding that Allen specifically intended to kill him. And, in the absence of the specific intent to kill, there is insufficient evidence to sustain a finding of attempted murder.

Washington and Dawson: Assault with a Deadly Weapon

Although Allen was the sole shooter, the prosecutor advanced two theories to hold other gang members criminally liable for Blackwell's death. As to Washington and Dawson, the prosecutor argued that they aided and abetted the shooting and/or the shooting was a natural and probable consequence of their breach of the peace or the assault. The underlying premise of both theories appears to be that every gangster who hung with other gangsters during the two- to three-year period of heightened tensions between rival gangs knew that one of his comrades would be armed and any encounter with rival gangsters, whether planned or anticipated or not, would lead to violence including assault and perhaps homicide. This premise risks imposing strict liability on every gang member present at the time of a shooting for any violence that erupts. Washington and Dawson insist there is insufficient evidence to support their convictions for assault based solely on their presence when Allen, without their knowledge or encouragement, suddenly pulled out a gun and shot Blackwell while he was running away up the stairwell.

Aiding and Abetting

The basic legal principles are easily summarized and the evidence against each defendant can be gleaned from the record. We begin with those relatively easy tasks. The difficulty, however, is in deciding what reasonable inferences a trier of fact could draw from the evidence in light of the applicable legal principles. The four to three decision by the Supreme Court in *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*), illustrates the difficulty the courts have in applying general principles to the unique facts presented in gang cases.

" 'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the

additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*Medina, supra*, 46 Cal.4th at p. 920.)

A person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) In other words, a person aids and abets a crime if that person knows of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) But mere presence alone or knowledge of the perpetrator's intent alone are insufficient to establish aiding and abetting. (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

Washington urges us to disassociate the evidence of his participation from that of Dawson's. We agree the Attorney General at times seems to rely on evidence pertaining to Dawson to incriminate Washington. We must carefully review the entire record for reasonable and credible evidence of solid value that Washington, divorced from Dawson, personally knew Allen planned to assault a rival gang member at a public hotel across the street from a police station with surveillance cameras recording the encounter, and encouraged or in some way assisted Allen with the specific intent of facilitating Allen's assault with a deadly weapon. Washington insists there is no evidence he saw Allen with

a gun or knew Allen was armed; no evidence he shouted any insults or obscenities at the rival gang members; no evidence he did or said anything other than stand in the narrow hallway talking on his cellphone; no evidence that any gang member identified him as a gang banger or believed he was an active gang member; and no evidence that he was an active participant at all. In sum, Washington asserts he was merely present when the shooting occurred.

As we explained above, there is more evidence of Washington's gang affiliation than he is willing to concede including his moniker, his email address, his text messages, his participation in the gangster rap video, and his interaction with an inmate who flashed him a gang sign. But even if Washington is, or was, an active gang member, his mere presence at a gang-related shooting does not mean he aided and abetted his comrade. Here, the prosecution relied much more heavily on the gang expert's testimony about what was foreseeable to any gang member than he did on any evidence of what Washington said or did before, during, or after the shooting.

The Attorney General reminds us, of course, to view the evidence in the light most favorable to the prosecution and presume the existence of every fact the jury could reasonably deduce from the evidence supporting the judgment. (*People v. Avila* (2009) 46 Cal.4th 680, 701; *People v. Carter* (2005) 36 Cal.4th 1114, 1156.) We understand our most basic charge. We remain cognizant, however, of the "grim reality that disputes between gang members are in a different category from disputes between civilians." (*Medina, supra*, 46 Cal.4th at p. 928 (dis. opn. of Moreno, J.).) In this vein, the Attorney General forthrightly states, "The actions and intent of Dawson and Washington cannot be divorced from the overall context of the confrontation between rival gangs."

The gang expert expressed little reservation in attributing knowledge and intention to gang members. He was comfortable concluding that group shootings had become so common that if a group of gang members went to a party one of them would be armed, all gang members followed a shoot on sight policy, and that every time rival gang

members saw each other they would "get into it." Given the violent history between the rival gangs and the group dynamic involved here, everyone involved would have expected that a simple form of disrespect between rival gang members, such as a verbal insult or hand gesture, would quickly degenerate into a shooting.

From this testimony, the Attorney General makes some extraordinary leaps. He argues: "Given the backdrop of gang culture and the violent rivalry between the gangs at issue here, it was reasonably inferable that Dawson and Washington would have known that engaging in a shouting match with FAB and Gunz Up gang members was tantamount to encouraging the escalation and use of violence against them. In the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed. [Citation.] . . . [Citations.] It was reasonable to infer from Allen's flashing of his gun, the conduct of the gang members collectively as a group, and the gang expert's testimony that Dawson and Washington were aware at the time of the conflict that Allen (or some other member of the group) possessed a gun and would use it to retaliate when disrespected by rival gang members."

Medina, supra, 46 Cal.4th 913, lends some support to the Attorney General's sweeping generalization as it relates to Dawson. Washington, however, does not fit the same profile. The record belies the many inferences the Attorney General draws against Washington. There is no evidence Washington engaged in the shouting match. There was no evidence he did anything to foment or exacerbate the verbal confrontation. Indeed, there was no evidence he participated in it at all. Similarly, there was no evidence he was aware that Allen, or any other gang member, was armed. There was no evidence he ever saw Allen's gun. There is no evidence he saw Allen "flash" it.

The split decision in *Medina* highlights the tension the courts face in finding peripheral gang members aiders and abettors to a shooting. Four justices took an expansive view of gang members' vicarious liability for the shooting based primarily on

the gang expert's testimony and an ex-gang member. Three members of the Lil Watts gang, George Marron, Raymond Vallejo, and Jose Medina, were celebrating the New Year in the home of an ex-gang member when Ernie Barba, a member of another gang, stopped by to pick up a compact disc. (*Medina, supra*, 46 Cal.4th at p. 916.) One of the gang members asked Barba, " 'Where are you from?' " a question in gang parlance representing an " 'aggression step.' " (*Id.* at pp. 916-917.) Worried about the safety of his children, the ex-gang member asked the gang members to go outside. (*Id.* at p. 917.) A fistfight ensued. Medina, Vallejo, and Marron all participated in the verbal confrontation and the fistfight. (*Ibid.*) The ex-gang member broke up the fight. (*Ibid.*) But someone said, " 'get the heat.' " (*Ibid.*) Medina then walked into the middle of the street and shot directly into Barba's car as he drove away. Barba died of a gunshot wound to the head. (*Ibid.*)

It was undisputed that Vallejo and Marron knowingly and intentionally participated in the fistfight and Medina alone shot and killed Barba. Vallejo and Marron were convicted as aiders and abettors under the natural and probable consequences doctrine. (*Medina, supra*, 46 Cal.4th at pp. 919-920.) Impressed by the gang expert's and ex-gang member's testimony that a shooting would be foreseeable to the average gang member who heard disrespectful verbal challenges, the majority upheld the convictions. The majority explained: "Given the gang-related purpose of the initial assault and the fact that, despite being outnumbered, Barba exhibited strength against three aggressors who could not avenge themselves in response to what they considered disrespectful behavior by Barba, the jury could reasonably have found that a person in defendants' position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable as Barba was retreating from the scene." (*Medina, supra*, 46 Cal.4th at pp. 922-923.)

The facts of *Medina* resemble the testimony offered against Dawson. Shaw testified that Dawson engaged in the verbal confrontation, shouting "Gunz down" along with the other gang members. Several witnesses testified that he was an active gang member and he positioned himself in front of the others at the confrontation ensued. Thus, his participation is arguably similar to the aider and abettors in *Medina* who knowingly participated in the fistfight that preceded the shooting. As to Dawson, therefore, there is sufficient evidence to sustain the jury verdict.

The three dissenting justices read the record much differently from the majority. They agreed with the Court of Appeal that there was insufficient evidence that Marron and Vallejo had aided and abetted the shooting in light of the fact that the two gangs were not even rivals, there was no evidence that either Vallejo or Marron had knowledge that Medina was in possession of a gun before or during the fistfight, the fight had not been planned, and the expert and ex-gang member had described possible, not probable, consequences that would follow a verbal threat. (*Medina, supra,* 46 Cal.4th at pp. 929-931 (dis. opn. of Moreno, J.).) The dissent concluded: "Stripped to its essence, what the majority holds is that the challenge 'Where are you from?' is so provocative in the context of gang culture that any response up to and including murder is a reasonably foreseeable consequence of that utterance, so as to justify a murder conviction not only of the actual perpetrator but also of any other gang members involved in the target offense, whatever the surrounding circumstances. I cannot subscribe to such an expansive interpretation of the natural and probable consequences doctrine even in the context of gang violence, which no one doubts is a plague upon some of our state's most vulnerable communities." (*Id.* at pp. 932 (dis. opn. of Moreno, J.).)

As expansive as the four-justice majority opinion is in *Medina,* it does not cast a wide enough net to catch Washington. The aiders and abettors in *Medina,* according to the majority, "knowingly and intentionally" participated in the fistfight. There is no evidence that Washington "knowingly and intentionally" engaged in any gang-related

provocation, verbal confrontation, or any other conduct that would foreseeably lead to violence. Rather the evidence showed that Washington accompanied gang members to what they all thought was a graduation party to meet girls in a public hotel, which was not situated in gang territory. There was further evidence that Washington was surprised by the shooting. He drove up to a gas station where Deandre Gomes, Shaw, and Anderson had assembled after the shooting and asked Shaw why Allen had fired. Moreover, there was no evidence Washington harbored any animosity toward member of Gunz Up. To the contrary, after the shooting he went on vacation with them.

We acknowledge, as the dissent did in *Medina*, that criminal street gangs are a scourge in their communities. But that grim reality does not give us license to characterize each and every gang member as an aider and abettor. In the absence of reasonable and credible evidence of solid value that a gang member had knowledge of the perpetrator's purpose and by act or advice aided the perpetrator with the intent of committing, encouraging, or facilitating the offense (*People v. Nguyen, supra,* 61 Cal.4th at p. 1054), we cannot say there is substantial evidence to support an aiding and abetting conviction. Here we conclude there is no evidence that Washington did or said anything to facilitate the shooting and no evidence that he knew that Allen was armed. Thus, the mere opinion of a gang expert that any card carrying gang member would know that a shooting would erupt under the circumstances occurring at the hotel is insufficient to support the verdict.

Breach of the Peace or Assault with a Deadly Weapon

To prove that Washington and Dawson were guilty of assault with a firearm under the natural and probable consequences theory, the People were required to prove that they were guilty of one of two crimes: (1) disturbing the peace by offensive words in a public place which are inherently likely to provoke an immediate violent reaction (§ 415, subd. (3)), or (2) assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1).) The jury was instructed: "Under a natural and probable consequences

theory, before you may decide whether the defendant is guilty of any crime charged against him, and/or any lesser included offense, you must decide whether the defendant is guilty of disturbing the peace by offensive words in a public place which are inherently likely to provoke an immediate violent reaction, a violation of Penal Code section 415(3) or assault by means of force likely to produce great bodily injury, in violation of Penal Code section 245(a)(1)." (CALCRIM No. 403; as given.)

Dawson

According to the testimony of Shaw and Anderson, Dawson was shouting gang slurs along with other gang members. And he positioned himself at the front of the group alongside Allen, the shooter. Based on this evidence, the jury could reasonably find that Dawson's actions would provoke an immediate response by rival gang members. This is sufficient to support the jury's verdict under the natural and probable consequences theory.

However, another issue remains. As noted earlier, Anderson and Shaw were both accomplices who received favorable plea agreements in exchange for their testimony. Under section 1111, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.) Corroboration is required "to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives." (*People v. Davis* (2005) 36 Cal.4th 510, 547.) "[T]he prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]" (*People v. Perry* (1972) 7 Cal.3d 756, 769.) An argument that an accomplice's testimony is not corroborated is analyzed as a sufficiency of the evidence issue. (*People v. Beaver* (2010) 186 Cal.App.4th 107, 114.)

The testimony of Anderson and Shaw establishes (1) that Dawson was present at the Holiday Inn on the evening in question, a fact also established by video surveillance and acknowledged by Dawson's counsel at trial, and (2) that Dawson confronted the three victims, shouting gang-related insults that preceded and arguably contributed to the deadly escalation of events that transpired. The latter testimony was corroborated generally by evidence of Dawson's gang membership in Guttah Boys, a gang hostile to Gunz Up, and more specifically by a rap video, taped mere hours before the violent confrontation, in which participants, including Dawson, are heard shouting "Gunz down," the words spoken during the confrontation at the Holiday Inn and referring to "1100" which represents "Gunz killer," or "Gunz down."

" 'The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone." ' " (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) Corroborating evidence does not need to provide independent proof of the offense to which the accomplice testifies. Indeed, " 'Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility.' " (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.) There was sufficient evidence here to corroborate the testimony of Anderson and Shaw and provide assurance of their credibility as witnesses. We reject Dawson's arguments to the contrary. In sum, Dawson's guilt is established by substantial evidence.

Washington

In contrast to the evidence of Dawson's incendiary statements, there is no evidence Washington said anything at all. Therefore, there is no basis that he used offensive words to provoke an immediate violent reaction. Others were shouting words that jurors could reasonably find would provoke rival gang members. The question is whether Washington's mere presence encouraged the others to breach the peace or to commit an assault. But since the law does not impose an affirmative duty on a bystander

to intervene and restore the peace (*People v. Nguyen*, *supra*, 21 Cal.App.4th at pp. 529-530), Washington's mere presence is not enough to trigger a natural and probable consequence theory of culpability.

We addressed some of these same issues recently in *People v. Lara* (2017) 9 Cal.App.5th 296. *People v. Lara* also involved gang members. But the two gang members who were convicted of assault with a firearm on an aiding and abetting and/or natural and probable consequences theory were far more involved in the underlying criminal conduct that preceded the assault. There was no dispute that Flores and Espinoza, the two gang members, had committed a burglary with other gang members before the assault and they were present when an assault with a firearm occurred. Following the assault, they both fled the scene and lied during their police interviews. We explained away the possible inferences of guilt. As for the flight, we wrote: "[T]he decision of Flores and Espinoza to flee the scene of a shooting does not support a reasonable conclusion they did so because of a consciousness of guilt rather than simple self-preservation or a desire to disassociate themselves from what had just occurred." (*Id*. at p. 323.) We similarly explained there could have been any number of reasons the two had lied. (*Id.* at pp. 324-325.) Despite the deferential standard of review of an insubstantiality claim, we concluded: "In sum, with respect to the jury's conclusion Flores and Espinoza committed murder, either as direct perpetrators or aiders and abettors in the murder, or as direct perpetrators or aiders and abettors in the assault with a firearm that foreseeably resulted in the murder, we conclude the evidence was not sufficiently solid or substantial to reasonably inspire confidence in their guilt." (*Id*. at p. 325.)

Washington, by contrast, was a peripheral figure throughout the encounter. The absence of evidence is telling. As recounted above, there is no evidence he said or did anything to assist Allen or the other gang members hurling their insults. To the contrary, he stood off to the side chatting on his cell phone. If the evidence in *People v. Lara* was

insufficient to uphold the assault conviction against Flores and Espinoza even though they were involved in the burglary, fled, and lied, we conclude yet again that the evidence is not sufficiently solid or substantial to reasonably inspire confidence in Washington's guilt.

IV

The Public Safety and Rehabilitation Act

Passed by California voters in November 2016, Proposition 57, the "Public Safety and Rehabilitation Act of 2016," was intended to change the state law "to require that, before youths can be transferred to adult court, they must have a hearing in juvenile court" and to ensure that youths "accused of committing certain severe crimes would no longer automatically be tried in adult court . . . ." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57 by the Legis. Analyst, p. 56.)

Welfare and Institutions Code section 707, subdivision (a)(1) requires that an allegation of criminal conduct against any person under 18 years of age must now be commenced in juvenile court. To prosecute the minor under general criminal law, the prosecution must file a motion to transfer the case from juvenile court to adult court. (Welf. & Inst. Code, § 707, subd. (a)(1); *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 (*Lara*).)

In *Lara, supra*, 4 Cal.5th 299, the California Supreme Court held that the Public Safety and Rehabilitation Act of 2016 applies retroactively to entitle a juvenile who was charged directly in adult court to a transfer hearing in juvenile court. (*Lara, supra*, 4 Cal.5th at pp. 303-304.) The Attorney General concedes that Dawson, who was 17 at the time of the charged offenses, was charged in adult court, and whose case is not final, is entitled to a transfer hearing. The California Supreme Court endorsed the remedy ordered by the appellate court in *People v. Vela* (2017) 11 Cal.App.5th 68: " 'Here, under these circumstances, Vela's conviction and sentence are conditionally reversed and we order the juvenile court to conduct a juvenile transfer hearing. ([Welf. & Inst. Code,

]§ 707.) When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer Vela's cause to a court of criminal jurisdiction. ([Welf. & Inst, Code,]§ 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred Vela to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then Vela's convictions and sentence are to be reinstated. ([Welf. & Inst. Code,]§ 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela's convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion.' " (*Lara, supra*, 4 Cal.5th at p. 310, quoting *Vela*, *supra*, at p. 82.)[4]

V

Instructional Error

Washington and Dawson argue the trial court's instruction allowing the jury to find them guilty of aiding and abetting the target offense of disturbing the peace by offensive words if the assault was a natural and probable consequence of the target offense was improper because disturbing the peace using offensive words is too trivial an offense. They claim the instructional error was prejudicial and denied them due process under the Fourteenth Amendment. Under the circumstances presented here, we disagree with their premise that disturbing the peace by using offensive words in a public place which are inherently likely to provoke an immediate violent reaction is a trivial offense. Their argument, therefore, is without merit.

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4 *Lara* cited the original decision issued in *People v. Vela*, then on review in the Supreme Court. The Supreme Court subsequently vacated the original opinion filed in *Vela* and the Court of Appeal refiled a substantially similar decision in *People v. Vela* (2018) 21 Cal.App.5th 1099.

We begin with the pertinent facts. The encounter involved rival gangs who, at the time of the shooting, had been involved in a two- to three-year period of intense violence including 26 shootings. The gang expert testified to the incendiary nature of gang slurs in a culture that prizes respect and punishes weakness. Offensive words in the Sacramento gang culture of 2010 could easily trigger an immediate violent reaction. Within this context, we simply cannot characterize the taunting and degrading of rival gang members as trivial.

Washington emphasizes other facts. We accept his version wherein he and his friends arrived at the hotel looking for a party, not a fight. And it may be true, as he argues, that his group did not try to corner the victims. Even if there is an innocent explanation for all of the gang members from different gangs ending up in the same hallway, there is no dispute that many of Washington's friends shouted such disparaging words as, "Gunz down," "What's up, bitch-ass niggas," and "Fuck the Gunz."

Because those offensive words when shouted at rival gang members were inherently likely to provoke an immediate violent reaction, we conclude they were not trivial.

The Attorney General urges us to trace the origins of the notion that trivial offenses cannot support conviction on a natural and probable consequences theory. (*People v. Prettyman* (1996) 14 Cal.4th 248; *People v. Solis* (1993) 20 Cal.App.4th 264.) Such an academic exercise is unnecessary. Even if we accept Washington's argument that these cases establish a principle precluding the use of trivial acts to support application of the natural and probable consequences theory of liability, the principle will not apply here because we have concluded the breach of peace in this case is not trivial.

VI

Sentencing

Multiple Victim Exception to Section 654

The trial court sentenced Allen to state prison for an aggregate indeterminate term of 65 years to life, based on 15 years to life for murder (count one), 25 years to life for the corresponding personal discharge of a firearm enhancement (§ 12022.53, subd. (d)), and 25 years to life on the same enhancement for attempted murder (count two). In addition, Allen was sentenced to state prison for an aggregate determinate term of 23 years, based on seven years for attempted murder, 10 years on the corresponding gang enhancement, one year four months for assault with a firearm (count five), one year four months on the corresponding personal use of a firearm enhancement (§ 12022.5, subd. (a)(1)), and three years four months on the corresponding gang enhancement. The sentence for assault with a firearm (count three) was stayed pursuant to section 654.

Allen raises a difficult sentencing issue involving the intersection of section 654's prohibition of multiple punishments for the same act and the Supreme Court's holding that section 654 does not preclude imposition of multiple enhancements based on a single great bodily injury because the enhancements " 'simply follow from' " convictions on the substantive offenses. (*People v. Oates* (2004) 32 Cal.4th 1048, 1066 (*Oates*).) Attempting to distance himself from *Oates*, he contends section 654 prohibits multiple punishment on multiple great bodily injury enhancements relating to the same injuries to the same individual. The Attorney General argues the multiple victim exception to section 654 applies because there were multiple victims of the assaults to which the gross bodily injury enhancements were attached.

According to *Oates*, the enhancements do not constitute separate crimes or offenses; rather they simply are the basis for the imposition of additional punishment for the underlying substantive offense. (*Oates, supra*, 32 Cal.4th at p. 1066.) Allen urges us

to reject, not only binding Supreme Court precedent, but also *People v. Reyes-Tornero* (2016) 4 Cal.App.5th 368 (*Reyes-Tornero*), a case particularly on point, which follows *Oates.* As an intermediate court of review, we must abide by the law as interpreted by our Supreme Court, though we share some of the misgivings expressed by others as to the wisdom of the principles that we must apply.

Thus, in his concurring opinion in *Reyes-Tornero*, Justice Poochigian observed that "the relevant 'act or omission' on review of a section 654 claim is the one that defendant asserts has been improperly subjected to multiple punishment." (*Reyes-Tornero, supra*, 4 Cal.App.5th at p. 380 (conc. opn. of Poochigian, J.).) He further explained, "In this case, defendant is not raising a section 654 challenge to the multiple punishment of the assaults on Ignacio, Nazario, and Jose. Instead, he is challenging the multiple punishment he received for his singular infliction of great bodily injury on Efren. Thus, with respect to defendant's claim, the 'act or omission' that is 'punishable' (§ 654, subd. (a)) by the GBI enhancements is the act of shooting Efren (not the acts of assaulting the other three individuals.)" (*Reyes-Tornero*, at pp. 380-381 (conc. opn. of Poochigian, J., fns. omitted).) We agree, but like Justice Poochigian, we are obliged to follow binding Supreme Court authority to the contrary. We thus turn to *Oates*, the precedent to which we must remain faithful.

Approaching the issue as a matter of statutory construction, the court began with the language of the pertinent statute—section 12022.53. Subdivision (f) *requires* that the enhancement be imposed as to each conviction. It reads, "If more than one enhancement per person is found true under this section, the court *shall impose* upon that person the enhancement that provides the longest term of imprisonment." (§ 12022.53, subd. (f), italics added.) The court rejected the defendant's argument that the number of enhancements should be limited to the same number of great bodily injuries inflicted. The court explained: "Had the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted

subdivision (d) to serve as the enhancement applicable to each qualifying conviction where there is only one qualifying injury, it could have said so." (*Oates, supra*, 32 Cal.4th at p. 1056.) In other words, the enactment of subdivision (f) "shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries." (*Id.* at p. 1057.)

Allen attempts to distinguish his case from *Oates.* He insists that the enhancement statute in *Oates* differs significantly from the statute imposing the enhancements on him. He highlights what he perceives as two important differences. Whereas section 12022.53 explicitly states, "notwithstanding any other provision of law," including according to the majority, section 654, section 12022.7 contains no analogous language. Whereas section 12022.53, subdivision (f) limits the number of enhancements to one per crime, suggesting the Legislature has chosen to limit enhancements based on the crimes committed rather than an analysis of the individual acts as called for in section 654, there is nothing in section 12022.7 suggesting that its one enhancement per crime limitation displaces, rather than complements, the one enhancement per act limitation of section 654.

We agree with the Attorney General that the statutory discussion in *Oates* was incidental to its central holding that section 654 did not preclude the imposition of multiple enhancements, attached to separate offenses but all based on one injury to a single person, because the multiple victim exception permitted the defendant to be punished for each violent offense he committed. (*Oates, supra*, 32 Cal.4th at pp. 1063-1066.) This holding was not based on the specific wording of the statute and, therefore, any differences between the enhancement statutes are not significant.

Moreover, there is nothing in the language of section 12022.7 that reflects a legislative intent to alter the multiple victim exception. To the contrary, the language in section 12022.7, subdivision (h), which generally imposes a limit on one enhancement per offense, rather than per defendant or per victim, suggests that the Legislature did not

intend to alter operation of the multiple victim exception. Allen suggests other minor distinctions that we conclude are unavailing.

It is true that *Oates* involved firearm enhancements. But the court in *Reyes-Tornero* applied the logic of *Oates* specifically to great bodily injury enhancements rejecting the defendant's argument that section 654 prohibited multiple punishment on multiple great bodily injury enhancements relating to the same injuries to the same individual. The court found that the multiple victim exception to section 654 applied because there were multiple victims of the several assaults to which the great bodily injury enhancements were attached. *Reyes-Tornero* is on point and disposes of defendant's argument that the multiple victim exception does not apply.

Neither *People v. Ahmed* (2011) 53 Cal.4th 156, nor *People v. Calles* (2012) 209 Cal.App.4th 1200, dictate a different result. *Ahmed* did not involve the multiple victim exception. And *Calles* did not address the question whether the multiple victim exception applies to great bodily injury enhancements. In the absence of a response from the Legislature or the Supreme Court, we are bound to follow *Oates* as applied to section 12022.7 great bodily injury enhancements in *Reyes-Tornero*, the two cases that are directly on point and dispositive of the issue before us.

Firearm Enhancements

Attempting to take advantage of new legislation giving the trial court discretion to strike firearm enhancements, Allen urges us to remand the case for resentencing. The Attorney General concedes the recently enacted Senate Bill No. 620 is retroactive. (See Stats. 2017, ch. 682, §§ 1 & 2; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Nevertheless, the Attorney General argues the case should not be remanded because the record shows that the trial court "would not . . . have exercised its discretion to lessen the sentence." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

The trial court originally sentenced Allen to a determinate term of 47 years plus 65 years. Allen requested the court to run his determinate and indeterminate life term concurrently. The court acknowledged its discretion to run all, some, or none of the terms concurrently. The court explained that this was "not just a situation where the additional offenses were de minimis or ancillary or not -- or attributable to [Allen] in some attenuated way or by virtue of some legal mechanism however legitimate and []appropriate under the law as reasonable and probable consequences." Instead, the offenses were "something directly that [Allen] did by his own hand and by his own pulling of the trigger." The court, therefore, denied Allen's request for concurrent sentencing.

The court also exercised its discretion to impose the middle, rather than the lower, terms on counts two and five. The court's sentencing choices further reflect the unlikelihood it would strike the firearm enhancements if given yet another opportunity. This is true particularly in the context of these sentencing proceedings. The trial court's original determinate sentence of 47 years was unauthorized. After resentencing, Allen's term was reduced to 23 years plus 65 years to life as required by law but again the court did not change any of its discretionary decisions. Given the court's recognition of the gravity of the murder Allen committed by shooting Blackwell in the back as he ran away, coupled with the fact the court's intended sentence already had been reduced, we agree with the Attorney General, the trial court would not further reduce Allen's sentence, if given the opportunity, by striking any of the firearm enhancements. Remand, therefore, would serve no purpose.

Other Sentencing Errors

Allen filed four supplemental briefs adding and dropping allegations of sentencing errors. We address what little remains of those claims.

On resentencing, the trial court sentenced Allen to a term of one year four months for count five, assault with a firearm. The Attorney General concedes that the trial court erroneously calculated one-third of the middle term under section 1170.1, subdivision (a). Since the offense is punishable by two, three, or four years in state prison, one-third the middle term of imprisonment for the offense is only one year and, therefore, Allen's sentence of one year and four months must be corrected accordingly.

Finally, Allen complains that the abstract of judgment does not refer to specific subdivisions of the relevant Penal Code sections. He cites no authority for the need to correct the abstract, nor does he give any reasons why such a correction is necessary. Specifically, he argues that the section 186.22, subdivision (b) designation should appear as "PC 186.22(b)(1)(C)." We conclude the final abstract of judgment is sufficient in this regard.

DISPOSITION

Allen's conviction for the attempted murder of Macafee is reversed, and his sentence on count five, assault with a firearm, is reduced to one year. In all other respects, the judgment of convictions against Allen are affirmed.

The judgment finding Washington guilty of assault with a deadly weapon and the accompanying gang enhancement is reversed.

Dawson's probation report should be corrected as ordered by the trial court by striking lines 12 through 15 on page No. 5. Dawson's convictions and sentence are conditionally reversed and remanded to the juvenile court to conduct a transfer hearing in accordance with *Lara, supra*, 4 Cal.5th 299. If the juvenile court determines at the transfer hearing that it would not have transferred defendant to a court of criminal jurisdiction, Dawson's criminal convictions and enhancements shall be deemed to be juvenile adjudications as of that date, and the juvenile court shall conduct a dispositional hearing. If, at the transfer hearing, the juvenile court determines that it would have

transferred Dawson to a court of criminal jurisdiction, the judgment shall be reinstated as of that date.

RAYE, P. J.

We concur:

HULL, J.

MURRAY, J.